

Background

This action alleges damage and pollution to the Illinois River Watershed (“IRW”) by virtue of Defendants’ poultry operations there.¹ The IRW straddles the Arkansas-Oklahoma line and covers large portions of Benton and Washington counties in Arkansas and Adair and Cherokee counties in Oklahoma. Specifically, the suit alleges damage to the IRW caused by improper storage and disposal of chicken litter. State has sued on multiple theories and seeks an award of punitive damages. In furtherance of data to support an appropriate punitive damages award, State has requested certain financial information from Defendants. Defendants have produced some information, but object to producing more. State seeks the data largely for its expert witness who on Jan. 5, 2009, served his expert reports in the Defendants’ ability to pay damages.

Financial Information Requested

In July 2006 State requested information regarding each Defendant’s net worth.² In September 2008, State served another request for financial discovery, this time focusing largely on Defendants’ financial statements.

To the extent you have not already produced them, please produce copies of documents reflecting your financial statements for fiscal years 2002 to the present, as well as any other documents reflecting your net worth for fiscal years 2002 to the present. For purposes of this request for production, the term “financial statement” includes, but is not necessarily limited to, balance sheets, statements of income, statements of equity position, statements of cash flow, and all footnotes.

On October 24, 2008, State requested a wide range of financial information, far beyond the previous Requests for Production:

¹ The Second Amended Complaint (“SAC”) [Dkt. No. 1215] contains a map that specifies the boundaries of the IRW. *See* Ex. “1” to the SAC.

² **Request for Production # 107** sought “all documents and materials reflecting, referring to or relating to your net worth.”

1. Audited financial statements with all notes for years ending in calendar 2003 through 2008.
2. Unaudited financial statements for most recent two year ends and most recent interim date. If audited statements not available as requested above, please provide unaudited, reviewed and/or compiled financial statements for years ending in calendar years 2003 through 2008.
3. Working trial balance at most recent year end and most recent interim financial reporting period.
4. Tax returns for 2006 and 2007, including all supporting schedules, disclosures, and detailed appreciation schedules.
5. Copy of any appraisal valuation or estimation of value prepared for or in connection with your business operations commencing in 2006, including the following:
 - assessment of tangible assets such as real property or equipment;
 - assessment of any stocks, securities, options, or other forms of securities issued by the company including but not limited to those documents utilized for financial reporting pursuant to Statement of Financial Accounting Statements (“SFAS”) No. 123R and APB Opinion No. 25;
 - collateral or business enterprise assessments issued to any financial institution;
 - assessments of cash flows employing discounting methods or other methods of valuing or estimating the fair value of long lived assets, business segments, trademarks or other intangibles including all documents prepared pursuant to the requirements of SFAS No. 159; and

- assessments of closely held shares for use in gifting, transferring, or assigning such shares in the company.
6. Copies of business plans, financial projections, forecasts, and pro forma financial statements issued to any lending institutions, investment/capital group, investment banker, broker, merger candidate, acquisition candidate, outside auditor, or any other party contemplating and/or consummating a significant financial transaction with the company since 2006.
 7. Copies of internally prepared budgets and forecasts utilized by management for planning, managing, or monitoring the company's operating results since 2006.

(Exhibit "D" to Dkt. No. 1868).

State filed its Motions to Compel on February 17, 2009. State seeks complete financial statements for five years with all footnotes and two years of tax returns.

The Defendants have produced varying amounts and types of financial information. George's Inc. and George's Farms, Inc. have provided balance sheets and income statements compiled for purposes of discovery responses. Cargill has provided a financial summary of net worth summarized from the company's audited financial statements. Peterson Farms has produced redacted financial information. In general, the Defendants take the position that they have provided information as to their net worth and nothing further is required.

Governing Principles of Law

It should be noted at the outset that discovery is a procedural matter governed in the federal courts by the Federal Rules of Civil Procedure. State discovery procedures

are irrelevant. *American Ben. Life Ins. Co. v. Ille*, 87 F.R.D. 540, 542 (W.D.Okla. 1978). Under Fed.R.Civ.P. 26(b)(1), a party is entitled to discovery of any non-privileged matter which is relevant to the subject matter involved in the pending action. Information concerning the defendants' finances is relevant in this case because it can be considered in determining punitive damages.

State has brought suit against Defendants on multiple theories of recovery, including state and federal based nuisance theories and trespass. Under each of these tort theories the State seeks an award of punitive damages. *See* Second Amended Complaint [Dkt. No. 1215] at ¶¶ 106, 117, 125 & VI(5). Oklahoma law provides:

In an action for the breach of an obligation not arising from contract, the jury, in addition to actual damages, may, subject to the provisions and limitations in subsections B, C and D of this section, award punitive damages for the sake of example and by way of punishing the defendant based upon the following factors:

1. The seriousness of the hazard to the public arising from the defendant's misconduct;
2. The profitability of the misconduct to the defendant;
3. The duration of the misconduct and any concealment of it;
4. The degree of the defendant's awareness of the hazard and of its excessiveness;
5. The attitude and conduct of the defendant upon discovery of the misconduct or hazard;
6. In the case of a defendant which is a corporation or other entity, the number and level of employees involved in causing or concealing the misconduct; and
7. *The financial condition of the defendant.*

23 Okl.St. Ann. § 9.1(A) (emphasis added).

Where punitive damages are properly pled, the “wealth” of the defendant is a relevant area of inquiry because the purpose of punitive damages is to punish past conduct and deter similar conduct in the future and “the degree of punishment or

deterrence resulting from a judgment is to some extent in proportion to the means of the guilty person.” *Restatement (Second) of Torts* § 908 comment (e) (1979).

When Plaintiff asserts a punitive damages claim, most federal courts permit pretrial discovery of financial information about the Defendant without requiring Plaintiff to establish a *prima facie* case on the issue of punitive damages.³ *Fretz v. Keltner*, 109 F.R.D. 303, 310-11 (D.Kan.1986) (“plaintiffs have alleged sufficient facts in support of their position [claim for punitive damages], therefore the requested information is both relevant and discoverable”); *American Ben. Life*, 87 F.R.D. at 542-43; *see generally*, D.E. Evins, Annotation, Pretrial Discovery of Defendant’s Financial Worth on Issue of Damages, 27 A.L.R.3d 1375, 1377 (1969). *See also* Annotation, Punitive Damages: Relationship to Defendant’s Wealth as Factor in Determining Propriety of Award, 87 A.L.R.4th 141 at §§ 3, 4 (1991).

When requested discovery appears relevant, the party opposing discovery has the burden of establishing the lack of relevance by demonstrating that the requested discovery either does not come within the scope of relevance set forth in Fed. R. Civ. P. 26(b)(1), or that it is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure. *Gen. Elec. Cap. Corp. v. Lear Corp.*, 215 F.R.D. 637, 640 (D.Kan. 2003) (citation omitted). A

³ However, this Court does not believe that merely pleading punitive damages is sufficient to warrant disclosure of a defendant’s confidential financial information in all cases. For example, where a punitive damage claim appears to have little merit, it would be appropriate to delay disclosure of financial information until the claim is tested by dispositive motion. *E.g. Toussaint-Hill v. Montereau in Warren Woods*, 2007 WL 3231720 at *1 (N.D.Okla. Oct. 29, 2007) (finding production of financial information would only be appropriate after a dispositive ruling on the issue of punitive damages). Furthermore, if it appeared that a request for financial information was made for improper purposes such as harassment, it would be appropriate to delay or deny the request.

party resisting discovery on the ground that the requests are overly broad has the burden of supporting its objection, unless the request is overly broad on its face. *McCoo v. Denny's, Inc.*, 192 F.R.D. 675, 686 (D.Kan. 2000).

Discussion

Oklahoma law permits evidence of net worth to be considered in determining punitive damages. *Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1460 (10th Cir. 1983); *Smith v. U. S. Gypsum Co.*, 612 P.2d 251, 255 (Okla. 1980). Federal courts that have addressed requests for financial information in the context of discovery have differed on how much financial discovery may be had. Compare *Krenning v. Hunter Health Clinic, Inc.*, 166 F.R.D. 33, 34 (D.Kan. 1996) (plaintiff may obtain pretrial discovery of defendant's financial statements and tax returns) with *Clark v. Baka*, 2008 WL 4531708 (E.D.Ark. Oct. 9, 2008) (“[I]f a case is made for punitive damages, the current net worth (not income statements) is the appropriate financial information to be produced.”)

State cites Magistrate Judge Frank McCarthy's May 3, 2002 *Order* in *City of Tulsa v. Tyson Foods, Inc., et al.* (hereafter, “*City of Tulsa*”), Case No. 01-CV-900 (N.D.Okla.) to support its argument that Defendants must produce full financial statements – i.e., (1) Balance Sheet, (2) Income Statement, and (3) Cash Flow Statement – as well as all explanatory footnotes. In *City of Tulsa*, Plaintiff sought “Copies of [each Defendant's] annual financial reports, income statements and balance sheets as of the end of each fiscal year since 1996 (inclusive).” *City of Tulsa*, Dkt. No. 85 at 3. State misreads the breadth of the Court's ruling in *City of Tulsa*. Judge McCarthy held that “some discovery of the Defendants' financial condition should be permitted,” but

expressly found that “Plaintiffs have not articulated sound reasons for permitting detailed discovery of the Defendants’ private financial affairs.” *Id.* at 5-6. Accordingly, the Court limited disclosure to financial statements “reflecting Defendants’ net worth from 1996 forward.” *Id.* at 6. The information that Judge McCarthy ordered produced was narrowly focused on Defendants’ net worth. In this regard, *City of Tulsa* is consistent with the other rulings by this Court.

In *Toussaint-Hill*, for example, Plaintiff in a Title VII race discrimination case sought financial information from defendant. The Court held that no financial disclosure would be ordered until Plaintiff’s punitive damage claim survived summary judgment. The Court held that only at that point would financial disclosure be ordered and disclosure would be limited to one balance sheet showing net worth. *Toussaint-Hill*, 2007 WL 3231720 at *1 (Defendant would be directed to produce “one balance sheet showing net worth for the year 2006.”).

In *Hightower v. Heritage Academy of Tulsa, Inc.*, 2008 WL 2937227 (N.D.Okla.), Plaintiff in a Title VII religious discrimination case sought defendant’s financial records and net worth from January 1, 2006 to the present. The Court limited discovery to “Defendant’s balance sheet for 2008 and its net worth for 2008.” *Id.* at *1.

In *Cardtoons, LLC v. Major League Baseball Players Association*, 199 F.R.D. 677 (N.D.Okla. 2001), Plaintiff sought financial documents from Defendant for 1993 and 2000. Plaintiff requested Defendant’s “balance sheets, income statements, profit and loss statements, and cash flow statements.” *Id.* at 686 n.17. The Court rejected Plaintiff’s broad requests and allowed only discovery of “Defendant’s year 2000 balance sheets.” *Id.* at 686.

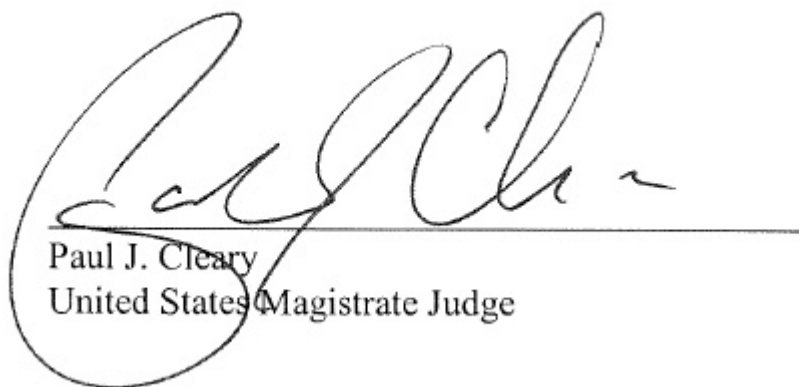
None of these cases – or any other cases brought to the court’s attention – have discussed the fine points the State has argued: issues involving audited and unaudited reports, redacted balance sheets, accountant compilation reports, financial footnotes and Generally Accepted Accounting Practices (GAPP) methodology. It would be easy to lose sight of the main issue in a sea of accounting details: State has asserted a claim for punitive damages and is entitled to offer evidence of Defendants’ financial condition to the jury at the appropriate time. The Court finds that the governing standard in this Court when a claim for punitive damages is presented is the net worth of the Defendant. This provides adequate information to advise the jury of the wealth of the Defendant so that an appropriate punitive damage award may be determined. The fact that the State will proffer an expert on Defendants’ “ability to pay” does not change the Court’s view as to what information is discoverable. A company’s financial history does not suddenly become discoverable merely because a party sponsor’s an expert witness. seeks to conduct a full financial study of the Defendant corporations including income and cash flow trends, asset and liability composition trends, etc., does not persuade the Court that all of this requested information is relevant or discoverable.

Defendants have produced far more financial information in this case than is normally required. State’s discovery requests have morphed from a request for net worth information to a demand for a corporate financial history. Indeed, the Oct. 24, 2008, letter raises serious concerns that the discovery process is being used for improper purposes here. The breadth of information sought in that letter goes far beyond what is reasonable under any interpretation of the law. Courts are wary of oppressive or needlessly invasive financial discovery. *E.g., Leidholt v. District Court In and For* , 619

P.2d 768, 771 (Colo. 1980) (“the permissible scope of discovery should include only material evidence of the defendant’s financial worth.”). Here, State’s expert has completed his reports on Defendants’ ability to pay damages. No protest was made before completion of those reports that Defendants had provided insufficient financial information. The additional wealth of financial details Mr. Payne seeks is highly invasive and has not been justified in my view. Its marginal relevance is far outweighed by the intrusion on privately held companies’ private and confidential business information.

Accordingly, the Court finds that the Motions to Compel [1866, 1867, 1868, 1869] are GRANTED IN PART AND DENIED IN PART. They are GRANTED insofar as they seek current net worth information. Defendants must produce financial records establishing their current net worth. The Court directs that each Defendant produce the balance sheet from its last audited financial statement and its most current balance sheet. In all other respects, the Motion to Compel is DENIED. The Motions for Protective Order [1881, 1882 and 1887] are GRANTED IN PART AND DENIED IN PART. They are DENIED as to the current net worth information and GRANTED in all other respects.

IT IS SO ORDERED this 13th day of March 2009.



Paul J. Cleary
United States Magistrate Judge